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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 230

ELMORE L. WESTGATE, PETITIONER

v.

FRED G. TIMMER, RECEIVER OF THE DIRECT REFIN-
ERY STATIONS, BERTHA L. WESTGATE, CLAIRE C.
REYNOLDS, AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF MICHIGAN

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Kent Circuit Court (R. 1546-1576) is unreported. The opinion of the Supreme Court of Michigan (R. 1712-1721) is not yet reported.

JURISDICTION

The judgment of the Supreme Court of Michigan was filed June 25, 1943 (R. 1722-1723). A petition for a writ of certiorari was filed August 5, 1943. The jurisdiction of this Court is invoked

under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Under a divorce decree rendered by the trial court November 30, 1938, later affirmed by the Supreme Court of Michigan, petitioner's wife was awarded a half interest in all of his properties as of August 10, 1937. The petitioner concealed his assets and received all of the income therefrom during the years 1936, 1937, and 1938, never accounting to his wife with respect thereto. Is the petitioner taxable on all the income so received?

2. Were any of petitioner's constitutional rights violated by the examination by revenue agents of petitioner's books and records in the possession of a receiver for petitioner's properties, or by their introduction in evidence by the Government at a hearing on the merits of its tax claims?¹

STATUTES INVOLVED

Revenue Act of 1938, c. 289, 52 Stat. 447:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions,

¹ The petition raises various additional issues relating directly to respondents other than the United States and they are therefore not discussed herein.

vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

Internal Revenue Code:

SEC. 3614. EXAMINATION OF BOOKS AND WITNESSES.

(a) *To Determine Liability of the Taxpayer.*—The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is authorized, by any officer or employee of the Bureau of Internal Revenue, including the field service, designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons.

* * * * *

(U. S. C., Title 26, Sec. 3614)

STATEMENT

Petitioner's wife, Bertha L. Westgate, was granted a divorce by the Circuit Court of Kent County, Michigan, on November 30, 1938 (R. 22-25). The Supreme Court of Michigan affirmed the decree in November 1939. *Westgate v. Westgate*, 291 Mich. 18. As permanent alimony the wife was awarded one-half interest in all of petitioner's properties as of August 10, 1937, including the business known as the Direct Refinery Stations and the wholesale gasoline business operated in connection with these stations (R. 24). In the decree the trial court reserved full jurisdiction of the parties and the subject matter in order that the decree might be amended or supplemented for the purpose of disposing of the fully disclosed property and property rights of the parties in connection with the award of permanent alimony (R. 25).

Subsequent to the trial court's decision and pending appeal, petitioner's wife petitioned the trial court for an accounting, naming Nellie Drake, Howard Drake, and others as defendants, and alleged they were conspiring with petitioner in concealing his properties and asked for appointment of a receiver (R. 28-37). In February 1939, the trial court appointed a receiver for petitioner's properties, including the wholesale business and retail stations; the receiver was given all the powers of a general receiver in equity and was

directed to take possession of the disputed properties, together with the books and records relating to the business (R. 66-71). The receiver sought to secure possession of the records located in petitioner's office at Mt. Pleasant, Michigan. Petitioner's son refused to turn them over whereupon the receiver, with the assistance of deputy sheriffs, took possession of them and moved them to Grand Rapids, Michigan. (R. 402.)² Shortly thereafter federal revenue agents began an investigation of petitioner's income and social security tax liability. They were unable to locate either Westgate or the Drakes. (R. 1111.) Westgate's records for 1936 and 1937 being incomplete, the agents questioned various persons and examined refinery records and other data (R. 1110-1112). The records were sufficient to disclose petitioner's tax liability for 1938 (R. 1112). On the basis of the reports filed by the agents, the Commissioner of Internal

² As to statements appearing on page 19 of petitioner's brief concerning arbitrary action by the receiver relative to these records, the receiver testified he had never refused petitioner the right to examine these records; that petitioner had never requested this right and that petitioner's son did examine the records (R. 611). Petitioner complains that entries were made in the records after the receiver took them over. These were made by Donald Glauz, receiver's assistant, a former employee of petitioner, and consisted merely of posting entries from original records of petitioner found in his office in order to bring the books up to date (R. 598). There is no contention they are not correct. The only evidence of tampering with the books was that petitioner's son, while examining the books in the custody of the receiver on behalf of the petitioner, made some unauthorized entries (R. 593-594).

Revenue assessed income and social security taxes for 1936, 1937, and 1938 and a proof of claim was filed in receivership proceedings for these taxes in the aggregate amount of \$135,123.66, plus interest (R. 116-122).³

It was petitioner's contention that on August 11, 1937, the date the divorce suit was filed, he relinquished his wholesale business which was thereafter owned and operated by Nellie Drake, his salaried bookkeeper, who had earned \$18 a week at that time (R. 619), and Howard Drake, her husband, a real estate dealer (R. 1070), who used the profits therefrom to purchase retail gasoline stations. For the year 1938 and part of 1937 the principal question was whether the wholesale business and retail stations belonged to petitioner and whether he received the income therefrom. At the hearing the Government introduced in evidence the assessment lists and assessment certificates (R. 566-567, 569-570), the records of petitioner (R. 618, 619, 620, 621, 625, 631-633) which were produced by the receiver under a subpoena *duces tecum* and oral and documentary evidence (R. 610-611).

No objection was made by petitioner to the introduction of the records on the ground they were

³ These taxes were as follows, including interest and penalties for fraud and failure to file returns:

Income taxes, 1936.....	\$4, 918. 27
Income taxes, 1937.....	30, 469. 97
Income taxes, 1938.....	90, 384. 29
Social security taxes, 1936, 1937, and 1938.....	9, 335. 13

wrongfully seized by the receiver (R. 632). The Government's evidence included admissions by Westgate to several persons that he was the owner of the properties and businesses at all times concerned, as well as evidence showing his activities in operating and managing the business after he claimed he had no further interest in them.⁴

⁴ Some of the testimony offered by the Government was as follows:

Richard A. Cross, salesman for Superior Oil Works, that petitioner told him in 1938 his business was a gold mine, that he was making about \$500 per day and that he kept the retail stations in the names of operators to evade social security taxes (R. 846-847), also that he was operating the wholesale business in 1938 in Nellie Drake's name and Howard Drake was supervising his stations (R. 839); Alexander B. Dickie, chief underwriter for a bonding company, that in May 1938 Nellie Drake told him petitioner had transferred his properties to her because he "had difficulty with his wife and therefore wanted to avoid further difficulties" (R. 715-717); Brown L. Meece, sales manager for Globe Oil and Refining Company, that petitioner, in September 1937, instructed him to invoice Nellie Drake for gasoline, stating it was necessary to handle it that way in order to protect his interests in the divorce suit (R. 655-657); Arthur Meyers, a salesman, that petitioner stated in August 1938 he was operating the wholesale business in Nellie Drake's name, that petitioner was the legal owner of all the properties, that he merely paid Nellie Drake a salary and that she and Howard Drake had no interest in the business (R. 695-696); Bertha L. Westgate, the divorced wife, that petitioner told her right after the divorce suit was filed in 1937 he was making about \$6,000 per month (R. 932); William P. Gibson, formerly petitioner's bookkeeper, that in 1938 petitioner spent much of his time at the office where the business was carried on and slept there, that the Drakes received salaries, that petitioner received no salary, but had an unlimited drawing account and gave all the orders around the office (R. 618-619).

Westgate did not testify and offered no evidence, although at an informal hearing before the Bureau of Internal Revenue he offered explanations (R. 941-1102) which the trial court characterized as "contradictory, inconclusive, and unbelievable" (R. 1551). The trial court found that the wholesale and retail businesses belonged to Westgate (R. 1555, 1556, 1577, 1579-1585), and it allowed the Government's claims in the aggregate amount of \$142,926.37 plus interest (R. 1588-1589). The Supreme Court of Michigan affirmed (R. 1712-1723).

ARGUMENT

I

The income from the retail and wholesale businesses was properly taxed to petitioner for the years 1936, 1937, and 1938. Mrs. Westgate had not received any of that income, and it had not been determined that she was entitled to receive any profits from the businesses, as alimony or otherwise, prior to November 30, 1938. The decree awarding her a half interest in the businesses was not rendered until November 30, 1938, and it was not affirmed until about one year later. The receiver was not put in charge of the properties until early in 1939. The petitioner received all the income from the properties during the years 1936, 1937, and 1938 and since it was then subject to his unfettered command, he was bound un-

der settled principles to report it in the years he received it, even though he might in a later year be compelled to account to his wife for one-half of the amount received. *North American Oil v. Burnet*, 286 U. S. 417; *Brown v. Helvering*, 291 U. S. 193.⁵

This case is distinguishable from *Helvering v. Fuller*, 310 U. S. 69 and *Pearce v. Commissioner*, 315 U. S. 543. In those cases it was held that where a husband has created a trust of income-producing property for the benefit of his wife, and he has been discharged of his obligation to support her, the income arising from the property after the discharge is taxable to her rather than to the husband. In the case at bar petitioner had not turned over the income-producing properties to his wife pursuant to the court's decree, the decree itself was not rendered until November 1938, and was not affirmed until 1939, and the income here involved was neither received by her nor available to her during the taxable years. The Commissioner therefore correctly taxed all of such income to the petitioner. Even if, contrary to our view, the income for the month of December 1938 should properly be taxed to her, the petitioner has failed to meet the burden of showing

⁵ Similar principles should govern with respect to the social security taxes involved herein.

the amount of income, if any, that belonged to the wife for that month.

II

There was no violation of petitioner's constitutional rights through the examination of his books and records by revenue agents or the introduction of these records in evidence by the Government. Section 3614, Internal Revenue Code, *supra*, provides that in order to determine the correctness of any return or for the purpose of making a return where none has been filed, the Commissioner of Internal Revenue may designate officers, employees, and field agents of the Bureau of Internal Revenue to examine any books, records, or memoranda bearing on the tax liability of the taxpayer. Here the taxpayer's records were in the custody of the receiver pursuant to an order of the court and the examination was made by the federal agents pursuant to the statutes, with the receiver's consent and without objection by petitioner. The books were admitted in evidence after they had been produced by the receiver pursuant to subpoena and were not objected to on the grounds now urged. And there is no reason to assume that the compulsory production of private papers of a taxpayer for examination of his tax liability for use in *civil* proceedings is improper. Cf.

Counselman v. Hitchcock, 142 U. S. 547; *Lees v. United States*, 150 U. S. 476.*

Gambino v. United States, 275 U. S. 310, cited by petitioner, is clearly inapplicable, for it involved an unlawful search without a warrant under the direction of federal agents and the conviction was based wholly on such evidence. Here there was no unlawful search or seizure and the agents of the Government had nothing to do with the seizure of the records or their custody.

CONCLUSION

The decision of the court below is correct and there is no conflict. The petition should therefore be denied.

Respectfully submitted.

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SEPTEMBER 1943.

* Moreover, the assessments by the Commissioner were *prima facie* correct. *Welch v. Helvering*, 290 U. S. 111; *Wickwire v. Reinecke*, 275 U. S. 101. Petitioner offered no evidence to show the assessments were erroneous and the records introduced in evidence were merely cumulative and in support of the assessments which were not controverted by any evidence.